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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 671

BAYSIDE FISH FLOUR COMPANY,
Appellant,

vs.

J. DALE GENTRY, EARL B. GILMORE, I. ZELLERBACH, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

STATEMENT AS TO JURISDICTION.

ROY DAILY,
Counsel for Appellant.

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BAYSIDE FISH FLOUR COMPANY,
A CORPORATION,

Appellant,

vs.

J. DALE GENTRY, EARL B. GILMORE, I. ZELLERBACH, U. S. WEBB AND JOHN L. FARLEY.

STATEMENT OF APPELLANT AND PLAINTIFF IN ERROR AS TO JURISDICTION ON APPEAL UNDER PARAGRAPH 9, RULE 11—POINTS ON WHICH IT EXPECTS TO RELY AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED.

POINT 1,

Act to establish a Fish and Game Code passed at the session of the California legislature of 1933, approved April 11, 1933, in effect August 21, 1933, each and every section thereof, especially sections 1060, 1064, 1065 and 1076 of said act are in contravention of and violate the Fourteenth Amendment to the Constitution of the United States, in that said act, and each and every section thereof and espe-

cially the sections hereinbefore specifically enumerated, deprive appellant and plaintiff in error of its property without due process of law, and deny to the plaintiff in error and appellant the equal protection of the law.

POINT 2.

Act to establish a Fish and Game Code passed at the session of the California legislature of 1933, approved April 11, 1933, in effect August 21, 1933, each and every section thereof, especially sections 1060, 1064, 1065 and 1076 of said act, as enforced and construed by the officers of the State of California, charged with the enforcement of said act, are in contravention of and violate the Fourteenth Amendment to the Constitution of the United States, in that said act and each and every section thereof, and especially the sections hereinbefore specifically enumerated, deprive appellant and plaintiff in error of its property without due process of law, and deny to the plaintiff in error and appellant the equal protection of the law.

POINT 3.

Act to establish a Fish and Game Code passed at the session of the California Legislature of 1933, approved April 11, 1933, in effect August 21, 1933, each and every section thereof, especially sections 1060, 1064, 1065 and 1076 of said act, violate paragraph three (3) Section eight (8), Article One (1) of the Constitution of the United States, known as the Commerce Clause of the Constitution of the United States.

POINT 4.

Act to establish a Fish and Game Code passed at the session of the California Legislature of 1933, approved April 11, 1933, in effect August 21, 1933, and each and every

section thereof, and especially sections 1060, 1064, 1065 and 1076 of said act, as enforced and construed by the officers of the State of California, charged with enforcement thereof, are in contravention of and violate paragraph three (3), Section eight (8), article one (1) of the Constitution of the United States, known as the Commerce Clause of the Constitution of the United States.

POINT 5.

Act to establish a Fish and Game Code passed at the session of the California Legislature of 1933, approved April 11, 1933, in effect August 21, 1933, and each and every section thereof, and especially sections 1060, 1064, 1065 and 1076 of said act, are in contravention of and violate paragraph one (1), Section ten (10), article one (1) of the Constitution of the United States, prohibiting a State from passing any law impairing the obligation of contracts.

POINT 6.

Act to establish a Fish and Game Code passed at the session of the California Legislature of 1933, approved April 11, 1933, in effect August 21, 1933, and each and every section thereof, and especially sections 1060, 1064, 1065 and 1076 of said Act, as enforced and construed by the officers of the State of California, charged with enforcement thereof, are in contravention of and violate paragraph one (1), Section ten (10), article one (1) of the Constitution of the United States, prohibiting a State from passing any law impairing the obligation of contracts.

POINT 7.

Act to establish a Fish and Game Code passed at the session of the California Legislature of 1933, approved April 11, 1933, in effect August 21, 1933, and each and

every section thereof, and especially sections 1060, 1064, 1065, and 1076 of said Act, and each of them, are in contravention of and violate paragraph one (1), Section two (2), article four (4) of the Constitution of the United States, providing that the citizens of each State shall be entitled to the privileges and immunities of citizens of the several States.

POINT 8.

Act to establish a Fish and Game Code passed at the session of the California Legislature of 1933, approved April 14, 1933, in effect August 21, 1933, and each and every section thereof, and especially sections 1060, 1064, 1065, and 1076 of said Act, and each of them, as construed and enforced by the officers of the State of California charged with enforcement thereof, are in contravention of and violate paragraph one (1), Section two (2), article four (4), of the Constitution of the United States, providing that the citizens of each State shall be entitled to the privileges and immunities of citizens of the several States.

POINT 9.

The three-judge court should have granted the application of appellant and plaintiff in error for an interlocutory injunction pending the hearing under the pleadings and proof in the case. Their failing and refusing to do so was error and against the decision of *Johnson* v. *Haydel*, 278 U. S. 16.

POINT 10.

The record discloses serious questions of law arising under the Federal Constitution and serious questions of discrimination supported by affidavits that the plaintiff in error and appellant will and is sustaining serious and irrep-

arable harm and injury by reason of the failure of the three-judge court to grant the application of appellant and plaintiff in error for an interlocutory injunction pending the hearing. It was, therefore, error not to grant the application of appellant and plaintiff in error.

POINT 11.

The granting of an interlocutory injunction prayed for by appellant and plaintiff in error was required in order to prevent appellant and plaintiff in error from suffering irreparable harm and injury pending the hearing and determination of the validity of the California act complained of and each section thereof as being in violation of the Federal Constitution of the United States hereinbefore referred to, in view of the seriousness of the alleged charges in respect to the invalidity of said act and the especial sections thereof hereinbefore set out, and in view of the uncontradicted affidavits filed in support thereof, and in view of the irreparable harm, injury and damage which the appellant and plaintiff in error will suffer by reason of the enforcement of the act, the three-judge court should have granted the application of plaintiff in error and appellant for an interlocutory injunction pending the hearing and determination in this cause.

POINT 12.

In determining as to the correctness of the action of the three-judge court in failing and refusing to grant to the plaintiff in error and appellant an interlocutory injunction pending the hearing of said cause on the merits, this Court will accept as true the affidavits offered by the appellant and plaintiff in error, in support of the allegations contained in the original bill of complaint.

POINT 13.

In determining as to whether or not the three-judge court committed error in failing and refusing to grant plaintiff in error and appellant an interlocutory injunction pending the hearing and determination of this cause, on final hearing, this Court will consider the affidavits offered by plaintiff in error *de novo*, and will determine for itself as to whether or not the application of appellant and plaintiff in error should have been granted.

POINT 14.

Where a State statute is attacked as being in violation of the Constitution of the United States, and charges of invalidity are made in good faith, and are serious, or where the allegations and proof contain charges of discrimination in the enforcement of the act, and where the plaintiff will suffer irreparable harm, injury and damage by reason of the enforcement thereof, an interlocutory injunction should always be granted pending the hearing and determination of the cause on the merits.

POINT 15.

Act to establish a Fish and Game Code passed at the session of the California legislature of 1933, approved April 11, 1933, in effect August 21, 1933, and especially sections 1060, 1064, 1065 and 1076 of said act, were not passed by the Legislature of the State of California in the legitimate exercise of its police powers, but are a mere subterfuge, and as passed and enforced, directly affect and obstruct interstate commerce between the States and foreign countries.

POINT 16.

Act to establish a Fish and Game Code passed at the session of the California Legislature of 1933, approved

April 11, 1933, in effect August 21, 1933, and especially sections 1060, 1064, 1065 and 1076 of said act, were not passed in the exercise of any legitimate police power of the State of California, but as passed and enforced were intended and do deprive appellant and plaintiff in error of its property without due process of law and deny it the equal protection of the law.

POINT 17.

A State, in the exercise of its police power, can pass no law directly affecting interstate commerce.

POINT 18.

Act to establish a Fish and Game Code passed at the session of the California Legislature of 1933, approved April 11, 1933, in effect August 21, 1933, and especially sections 1060, 1064, 1065 and 1076 of said act, were not passed for the purpose of conserving the natural resources of the State, but passed for the purpose alleged, and in the enforcement and operation thereof necessarily violate the Fourteenth Amendment of the Constitution of the United States, in the particulars hereinbefore set forth, and impose a direct burden upon interstate commerce.

POINT 19.

The three-judge court in refusing to grant to appellant and plaintiff in error a temporary injunction disregarded the rules of law laid down by this Court in the cases *Foster Fountain Packing Company* v. *Haydel*, 278 U. S. 1, and *Johnson* v. *Haydel*, 278 U. S. 16.

POINT 20.

Under the facts in this case and the law applicable thereto the application for interlocutory injunction should have been granted.

ROY DAILY,
Attorney for Plaintiff in Error and Appellant.

(Endorsed:) Receipt of a copy of the within Statement as to jurisdiction on appeal is hereby admitted this 8th day of October, 1934.

U. S. WEBB,
RALPH O. MARRON,
DARWIN BRYAN,
Attorneys for Defendants & Appellees.

Filed Oct. 8, 1934.